## Elizabeth Jeevamalar Ponnampalam & Ors v Karuppannan a/l Ramasamy & Anor (Sundram a/l Marappa Goundan & Anor as interveners; Raya Realty (sued as a firm) as third party)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–728 OF 2003
MOKHTAR SIDIN, MOHD GHAZALI AND ZULKEFLI JJCA
11 APRIL 2007

*Contract — Option to purchase — Sale and purchase of property — Failure to pay 10% deposit as stipulated in option — Whether option was binding*

*Contract — Sale and purchase of land — Option — Failure to pay 10% deposit as stipulated in option — Whether option was binding*

*Land Law — Sale of land — Option — Failure to pay 10% deposit as stipulated in option — Whether option was binding*

The first to the sixth defendants ('defendants') were co-owners of a piece of land measuring approximately 12.5125 acres ('land'). Raya Realty ('third party') was acting as an estate agent and was to arrange for the sale of the land for the defendants. The first and second intervener plaintiffs relied on the third party's option dated 9 October 1988 and offered RM28,000 per acre to the third party to purchase the land and authorized the third party to negotiate the purchase. Based on the third party's option, the total selling price would be RM350,350. The first and second plaintiffs claimed to have also purchased the land through the third party at the price of RM28,000 per acre. They relied on the third party's option dated 10 October 1988. The first and second plaintiffs lodged a private caveat over the land. The solicitors acting for the defendants informed the third party that the negotiations for sale of the land with the first and second intervener plaintiffs was not to be proceeded with vide letter dated 19 October 1988. The first and second plaintiffs sued the defendants and the third party in the High Court for specific performance of the sale of the land. The first and second intervener plaintiffs intervened by leave of court and pleadings thereafter were filed and settled. The learned trial judge held, inter alia that the first and second intervener plaintiffs be entitled to specific performance of the sale of the land at a purchase price of RM28,000 per acre against the defendants with costs and that the defendants' claim against the third party be dismissed with costs. The defendants appealed and the first and second plaintiffs cross appealed. The first and second plaintiffs instead argued that they were entitled to specific performance of the sale of the land at a purchase price of RM28,000 per acre against the defendants. The issue was whether the 10% of the purchase price was fully paid within the required time frame to result in there being a concluded agreement to buy and sell in respect of the land.

**Held**, allowing the defendants' appeal against the order granting specific performance of the sale of the land to the intervener plaintiffs:

(1) On 9 October 1988 only a sum of RM35,000 was paid. This was RM35 less than 10% of the amount of RM35,035 deposit which should be issued and paid for by the intervener plaintiffs as purchasers. The returning of the two cheques by the defendant's solicitors to the third party vide their letter dated 19 October 1988 would show that there was no acceptance of the 10% deposit. It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with (see paras 10–11).

(2) Since the 10% deposit was not paid by 18 October 1988 and thus there was no acceptance of the 10% deposit by the defendants, it followed that there was no binding or concluded contract between the intervener plaintiffs and the third party and consequently there was no binding or concluded contract between the intervener plaintiffs and the defendants as vendors. For these reasons alone the defendants' appeal against the order of the learned trial judge granting specific performance of the sale of the land to the intervener plaintiffs would succeed (see para 12).

(3) Regarding the issue of whether there was a concluded contract when payments were made by the first and the second plaintiffs in allegedly exercising the option given by the third party acting for the defendants, it was noted at the outset that the first and second plaintiffs' claim as pleaded by them in the statement of claim was based on an oral agreement of sale made with the third party. In this case the learned trial judge had erred when he failed to consider the pleaded case at all. He had instead found that there was a concluded agreement in writing namely the option dated 10 October 1988. There was no amendment made to the first and second plaintiffs' statement of claim on this point. In this case that failure to consider the pleaded case, but deciding on an unpleaded case in a civil litigation was a clear misdirection. The appellate court in the circumstances of this case therefore has a duty to intervene where the trial court had so fundamentally misdirected itself (see para 13)

(4) The 10% deposit under the option was not paid. There was no binding or concluded contract between the first and second plaintiffs and the third party and it consequently followed that there was no binding or concluded contract between the first and second plaintiffs and the defendants. Further the option granted to the first and second plaintiffs was conditional upon the lapse of the existing offer by the first and second intervener plaintiffs. This was the pleaded case by the third party. This was also pleaded in the alternative by the defendants in their defence. The learned trial judge had failed to address this aspect of the case. Had the learned trial judge adequately approached this point as an issue before him, he would have found that the facts did not support his finding that there was a concluded contract. This was because at that point of time when the offer under the option was said to be made by the plaintiffs, the offer by the first and second intervener plaintiffs under the same option was still subsisting. Therefore, when the condition in the option was not satisfied there could be no concluded contract (see paras 20–21).

(5) The court need not have to consider the actual authority vested in the third party as an estate agent for the defendants. The court was only concerned with his apparent and/or ostensible authority in his dealings with the intervener plaintiffs and the plaintiffs. What the third party as estate agent contrived to do was well within that so-called apparent or ostensible authority. When he said and set the purchase price at RM28,000 per acre the intervener plaintiffs and the plaintiffs were fully entitled to accept that statement as that of the landowners (the defendants) and act thereon accordingly. Even if no consent had been given by the defendants to the third party then (which intending purchasers would not normally know about) such an offer was made by the third party in the ordinary and usual course of his business as estate agent and as representing the landowners. Therefore it could not be gainsaid that he did not have the apparent and/or ostensible authority to do so to bind his principal to the slightly lower purchase price of RM28,000 per acre for the land. For these reasons, the defendants had no merit in their appeal against the order of the learned trial judge in dismissing their claim for indemnity against the third party (see para 22).

**[Bahasa Malaysia summary**

Defendan pertama hingga keenam ('defendan-defendan') adalah pemilik bersama ke atas sebidang tanah yang berkeluasan kira-kira 12.5125 ekar ('tanah'). Raya Realty ('pihak ketiga') bertindak sebagai ejen hartanah dan yang menguruskan penjualan tanah tersebut bagi pihak defendan-defendan. Pencelah plaintif pertama dan kedua bergantung kepada opsyen pihak ketiga yang bertarikh 9 Oktober 1988 dan menawarkan RM28,000 seekar kepada pihak ketiga untuk membeli tanah tersebut dan memberi kuasa kepada pihak ketiga untuk merundingkan pembelian. Berdasarkan kepada opsyen pihak ketiga, harga jualan keseluruhan adalah RM350,350. Plaintif pertama dan kedua juga mengatakan telah membeli tanah tersebut melalui pihak ketiga pada harga RM28,000 seekar. Mereka bergantung kepada opsyen bertarikh 10 Oktober 1988. Plaintif pertama dan kedua telah mengemukakan kaveat persendirian ke atas tanah tersebut. Peguamcara yang bertindak bagi pihak defendan-defendan memberitahu pihak ketiga bahawa rundingan untuk penjualan tanah tersebut dengan pencelah plaintif pertama dan kedua adalah tidak diteruskan berdasarkan surat bertarikh 19 Oktober 1988. Plaintif pertama dan kedua mendakwa defendan-defendan dan pihak ketiga di mahkamah tinggi untuk pelaksanaan spesifik penjualan tanah tersebut. Pencelah plaintif pertama dan kedua mencelah dengan kebenaran mahkamah dan pliding kemudiannya telah difailkan dan telah selesai. Hakim bicara yang bijaksana memutuskan, antara lain bahawa pencelah plaintif pertama dan kedua adalah berhak kepada pelaksanaan spesifik penjualan tanah tersebut pada harga belian RM28,000 seekar terhadap defendan-defendan dengan kos dan dengan itu tuntutan defendan-defendan terhadap pihak ketiga ditolak dengan kos. Defendan-defendan merayu dan plaintif pertama dan kedua membuat rayuan balas. Plaintif pertama dan kedua sebaliknya mengatakan bahawa mereka berhak kepada pelaksanaan spesifik penjualan tanah tersebut pada harga belian RM28,000 seekar terhadap defendan-defendan. Isunya adalah sama ada 10% daripada harga belian telah dibayar sepenuhnya dalam tempoh masa yang dikehendaki untuk menjadikan perjanjian tercapai untuk pembelian dan penjualan tanah tersebut.

**Diputuskan**, membenarkan rayuan defendan-defendan terhadap perintah membenarkan pelaksanaan spesifik penjualan tanah kepada pencelah plaintif-plaintif.

(1) Pada 9 Oktober 1988 hanya sejumlah RM35,000 telah dibayar. Ini adalah kurang RM35 daripada 10% daripada jumlah deposit RM356,035 yang sepatutnya dikeluarkan dan dibayar oleh pencelah plaintif sebagai pembeli. Pemulangan dua cek oleh peguamcara defendan-defendan kepada pihak ketiga melalui surat mereka bertarikh 19 Oktobder 1988 menunjukkan tidak terdapatnya penerimaan 10% deposit. Adalah undang-undang yang tetap bahawa opsyen adalah kontrak satu pihak yang tidak mengikat pemberi geran opsyen sehingga terma-terma sebenar opsyen dipatuhi (lihat perenggan 10–11).

(2) Apabila 10% deposit tidak dibayar sebelum 18 Oktober dan sesungguhnya tidak terdapatnya penerimaan deposit 10% oleh defendan-defendan, ia diikuti dengan tidak terdapatnya kontrak yang mengikat atau tercapai di antara pencelah plaintif dan pihak ketiga dan seterusnya tidak terdapatnya kontrak yang mengikat atau tercapai di antara pencelah plaintif dan defendan-defendan sebagai vendor. Berdasarkan alasan ini sahaja rayuan defendan-defendan terhadap perintah hakim bicara yang bijaksana membenarkan pelaksanaan spesifik penjualan tanah tersebut kepada pencelah plaintif akan Berjaya (lihat perenggan 12).

(3) Berkenaan dengan isu sama ada terdapatnya kontrak yang dicapai apabila pembayaran telah dibuat oleh plaintif pertama dan kedua dalam menyatakan pelaksanaan opsyen yang diberikan oleh pihak ketiga untuk defendan-defendan, ianya dinyatakan pada mulanya bahawa tuntutan plaintif pertama dan kedua seperti mana diplidkan oleh mereka di dalam pernyataan tuntutan adalah berdasarkan perjanjian lisan penjualan dengan pihak ketiga. Dalam kes ini hakim bicara yang bijaksana telah terkhilaf apabila beliau gagal untuk mempertimbangkan langsung kes yang diplidkan. Beliau sebaliknya mendapati bahawa terdapatnya perjanjian yang dicapai secara bertulis iaitu opsyen yang bertarikh 10 Oktober 1988. tidak terdapatnya pindaan dilakukan kepada pernyataan tuntutan plaintif pertama dan kedua berkenaan perkara ini. Dalam kes ini kegagalan untuk mempertimbangkan kes yang diplidkan, tetapi memutuskan ke atas kes yang tidak diplidkan dalam litigasi sivil adalah jelas satu penyalaharahan. Mahkamah rayuan dalam situasi kes ini, oleh itu mempunyai tugas untuk campur tangan yang mana mahkamah bicara telah secvara dasarnya menyalaharahkan dirinya (lihat perenggan 13).

(4) Deposit 10% di bawah opsyen adalah tidak dibayar. Tidak terdapatnya kontrak yang mengikat atau dicapai di antara plaintif pertama dan kedua dengan pihak ketiga dan selanjutnya diikuti bahawa tidak terdapatnya kontrak yang mengikat atau dicapai di antara plaintif pertama dan kedua dengan defendan-defendan. Seterusnya, opsyen yang diberikan kepada plaintif pertama dan kedua adalah bersyarat ke atas luputnya tawaran yang wujud oleh pencelah plaintif pertama dan kedua. Ini adalah kes yang telah diplidkan oleh pihak ketiga. Ini juga telah diplidkan secara alternatif oleh defendan-defendan di dalam pembelaan mereka. Hakim bicara yang bijaksana telah gagal untuk menumpukan perhatian aspek ini. Jika hakim bicara yang bijaksana memberikan pendekatan yang secukupnya perkara ini sebagai isu

di hadapannya, beliau akan mendapati bahawa fakta-fakta tidak menyokong dapatannya bahawa terdapatnya satu kontrak yang dicapai. Ini adalah kerana pada masa apabila tawaran di bawah opsyen menyatakan akan dibuat oleh plaintif-plaintif, tawaran oleh pencelah plaintif pertama dan kedua di bawah opsyen yang sama masih wujud. Oleh itu, apabila syarat di dalam opsyen tidak dipenuhi, maka tiada kontrak yang dicapai (lihat perenggan 20–21).

(5) Mahkamah tidak perlu mempertimbangkan kuasa sebenar yang diberikan kepada pihak ketiga sebagai agen hartanah untuk defendan-defendan. Mahkamah hanya mengambil berat dengan kuasa yang jelas dan/atau berkemungkinan dalam urusannya dengan pencelah plaintif dan plaintif-plaintif. Apa yang pihak ketiga sebagai egen hartanah buat-buat lakukannya adalah sebaiknya di dalam kononnya kuasa yang jelas dan/atau berkemungkinan. Apabila beliau menyatakan dan menetapkan harga belian pada RM28,000 seekar pencelah plaintif dan plaintif-plaintif adalah berhak keseluruhannya untuk menerima pernyataan sebagai pemilik tanah (defendan-defendan) dan bertindak dengan sewajarnya. Walaupun jika tiada kebenaran diberikan oleh defendan-defendan kepada pihak ketiga (yang mana pembeli yang berminat secara tidak kebiasaannya tahu) tawaran tersebut adalah dibuat oleh pihak ketiga di dalam urusan kebiasaan perniagaannya sebagai egen hartanah dan sebagai mewakili pemilik tanah. Oleh yang demikian adalah tidak boleh dinafikan bahawa beliau tidak mempunyai kuasa yang nyata dan/atau berkemungkinan melakukannya untuk mengikat prinsipalnya untuk menurunkan sedikit harga belian RM28,000 seekar bagi tanah tersebut. Untuk alas an ini, defendan tidak mempunyai merit dalam rayuan mereka terhadap perintah hakim bicara yang bijaksana dalam menolak tuntutan mereka untuk ganti rugi terhadap pihak ketiga (lihat perenggan 22).]

**Notes**

For a case on sale and purchase of property, see 10 *Mallal's Digest* (4th Ed, 2003 Reissue) para 3983.

For cases on option, see 9 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4286–4298.

For cases on option, sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4107–4123.

**Cases referred to**

*Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy* [1996] 3 MLJ 385 (refd)

*Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (refd)

**Legislation referred to**

Contract Act 1950 s 190 Illustration (a)

National Land Code 1965 s 327

*Bastian Vendargon (Dennis Appaduray with him) (Dennis Nik & Wong) the first to the sixth defendants.*

*Mura Raju (Mura Raju & Co) for the respondents (the first and second plaintiffs).*

*N Chandran (Ranjan Chandran and Susan Joseph with him) (Azman Joseph & Associates) for the respondents/interveners (the first and second intervener plaintiffs).*

*Prasad Abraham (Prasad Abraham & Associates) for the respondent/third party.*

**Zulkefli JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This is an appeal by the first to the sixth defendants against the whole decision of the High Court at Kuala Lumpur dated 15 August 2003. Essentially the decision of the learned trial judge of the High Court comprises of the following orders:

(i) that the first and second intervener plaintiffs [as referred to in the court below] are entitled to specific performance of the sale of land held under CT 4217, lots 52 and 62, Mukim Ringlet, District of Cameron Highlands, Pahang ('land') at a purchase price of RM28,000 per acre against the first to the sixth defendants with costs;

(ii) that the first and second plaintiffs be awarded damages to be assessed by the learned senior assistant registrar against the first to the sixth defendants;

(iii) that the first to the sixth defendants' counterclaim against the first and the second plaintiffs be dismissed with costs.

(iv) that the first to the sixth defendants' claim against the third party be dismissed with costs.

**[2]** The first and second plaintiffs have also filed a cross appeal. It is the first and second plaintiffs' contention that they are entitled to specific performance of the sale of the said land at a purchase price of RM28,000 per acre against the first to the sixth defendants.

BACKGROUND FACTS

**[3]** The relevant background facts of the case are as follows:

(1) The first to the sixth defendants were co-owners of the said land of about 12.5125 acres in size;

(2) The third party, Raya Realty (sued as a firm) was acting as an estate agent and was to arrange for the sale of the said land for the first to the sixth defendants;

(3) The third party had an option dated 15 October 1988 to offer and sell the said land at RM30,000 per acre from the first to the sixth defendants;

(4) The third party offered the said land for sale at RM35,000 per acre vide proforma letter dated 6 October 1988;

(5) The first and second intervener plaintiffs relied on the third party's option dated 9 October 1988 and offered RM28,000 per acre to the third party to purchase the said land and authorized the third party to negotiate the purchase. The first draft agreement for the purchase of the said land was prepared by Messrs Skrine & Co ('solicitors');

(6) The first and second plaintiffs claimed to have also purchased the said land through the third party at the price of RM28,000 per acre. They relied on the third party's option dated 10 October 1988;

(7) The first and second plaintiffs lodged a private caveat over the said land on the 15 October 1988 by serial No 691/88;

(8) Messrs Skrine & Co acting for the first to sixth defendants informed the third party that the negotiations for sale of the said land with the first and second intervener plaintiffs was not to be proceeded with vide letter dated 19 October 1988;

(9) The first and second plaintiffs sued the first to the sixth defendants and the third party who was also cited as the seventh defendant in the High Court below for specific performance of the sale of the said land;

(10) The first to the sixth defendants counterclaimed and issued a Third Party Notice of Indemnity against the seventh defendant/third party in respect of the first and second plaintiffs' action against the first to the sixth defendants;

(11) The first and second intervener plaintiffs intervened by leave of court and pleadings thereafter were filed and settled;

(12) The first to the sixth defendants again issued third party notice of Indemnity against the third party in respect of the first and second intervener plaintiffs' action against the first to the sixth defendants.

DECISION OF THE COURT ON APPEAL

**[4]** I shall first deal with this appeal by addressing to the option document dated 9 October 1988 entered into between the intervener plaintiffs and the third party, appointed as the estate agent by the first to the sixth defendants to ascertain whether there was a concluded agreement to buy and sell in respect of the said land as found by the learned trial judge. The said Option dated 9 October 1988 reads as follows:

> Re: Option to Purchase Title No CT No 4217 Lot No 52 & 62 Seksyen:… Mukim: Ringlet Daerah: Cameron Highlands Postal Address: Batu 33, Ringlet, Cameron Highlands, Pahang
>
> In consideration of the sum of $17,500 cash/cheque No UMBC 711033 paid by Sinnan a/l Kandan & Sundaram s/o Marappa Goundan to me/us (the receipt of which I/we hereby acknowledge), I/We hereby grant you an option to purchase my/our above-named property subject to the following terms and conditions:
>
> (i) The purchase price is $28,000 per acre payable by a deposit of ten percent (10%) of the total purchase price upon your exercising this option and the balance thereof within 4 (four) months thereafter.
>
> (ii) The balance of purchase price will be paid to Messrs Skrine & Co, 3rd Floor, Straits Trading Building, No 4, Leboh Pasar Besar, Kuala Lumpur as stakeholders to be released to me/us upon presentation of the transfer for registration and after deducting real property gains tax payable by me/us.
>
> (iii) Upon your exercising this option I/we will deposit the document of title of my/our above-named property and a duly executed transfer with the aforesaid solicitors as stakeholders.

(iv) Failure on your part to pay the balance of purchase price within the time aforesaid will result in the forfeiture of the deposit.

(v) Vacant possession will be delivered to you upon payment of the balance of purchase price. Assessment and quit rent will also be apportioned as at the date of payment of the balance of purchase price.

(vi) The consideration of $17,500 paid herein will be credited to an account of the deposit payable upon your exercising this option. However in the event of your failure to exercise this option $3,500 will be forfeited and the balance will be refunded to you.

(vii) This option will automatically lapse if not exercised within 18 October 1988, (9) days from this date hereof.

**[5]** It is noted that the option dated 9 October 1988 had the following essential terms:

(i) the purchase price was RM28,000 per acre;

(ii) the option would be exercised if ten percent deposit was paid; and

(iii) the option would lapse if not exercised on or before the date 18 October 1988.

**[6]** The burden is on the first and second intervener plaintiffs to prove that they had an agreement to purchase, and had complied with the terms of the option particularly with regard to the payment of the ten percent deposit. From the evidence adduced at the trial the first and the second intervener plaintiffs were found to have offered the price of RM28,000 per acre to the third party for the purchase of the said land and for the third party to negotiate the purchase from the first to the sixth defendants. However there is no cogent evidence that the ten percent payment of deposit referred to in the option had been paid.

**[7]** From the draft agreement in respect of the purchase of the said land prepared by Messrs Skrine & Co, it would suggest that the terms had not been finalized and agreed to by all the defendants. The first to the sixth defendants through Messrs Skrine & Co had also informed the third party that the sale of the said land should not be proceeded with vide their letter dated 19 October 1988 and returning the two cheques belonging to the third party. The letter dated 19 October 1988 is reproduced in full which reads as follows:

CCL/YSM/116347.9

RR/175/88

October 19, 1988.

Raya Realti

No. 42–1 Lorong Vivekananda,

Brickfields, 50470 Kuala Lumpur.

Dear Sirs,

CT No 4217 LOT 52 & 62 MUKIM RINGLET

We refer to the above and write to inform you that we have now received instructions from our clients that they are not proceeding with the sale of the abovementioned property until and unless the Private Caveat lodged by Mr Amchiappan a/l Sellappan and Mr Karuppannan a/l Ramasamy is removed.

In the circumstances, we return herewith the following cheques for your onward transmission to the prospective purchasers, Mr Sundaram s/o Marappa Goundan and Mr Sinnan a/l Kandan:

(1) UMBC Cheque No 711034 dated 9 October 1988 for the sum of $17,500.

(2) The Oriental Bank cheque No 522209 dated 15 October 1988 for the sum of $17,500.

Yours faithfully,

Sgd.

Enc.

ccclients.

**[8]** Based on the size of the said land of approximately 12.5125 acres the agent's selling price would be RM28,000 per acre x 12.5125 = RM350,350. This fact is confirmed by virtue of the selling price being RM350,350 as stated in the draft sale and purchase agreement prepared by Messrs Skrine & Co (see p 566 of the Appeal Record (Volume II)). The vital question to be decided here is whether that ten percent of the purchase price was fully paid within the required time frame.

**[9]** The evidence on record showed that the intervener plaintiffs through the evidence of their representative S13 (Mohd Azri Periasamy bin Abdullah) had issued two cheques as follows:

(i) UMBC cheque 711033 dated 9 October 1988 for the sum of RM17,500 in favour of Raya Realti, the agent.

(ii) UMBC cheque 711034 dated 9 October 1988 for the sum of RM17,500 in favour of Messrs Skrine & Co, the vendors' solicitors (see pp 553–554 of the Appeal Record (Volume II)).

**[10]** Therefore on 9 October 1988 only a sum of RM35,000 was paid. This is RM35 less than ten percent of the amount of RM35,035 deposit which should be issued and paid for by the intervener plaintiffs as purchasers. I am also of the view that the returning of the two cheques, ie, UMBC cheque No 711033 and 711034 by Messrs Skrine & Co to the third party vide their letter dated 19 October 1988 would show that there was no acceptance of the ten percent deposit.

**[11]** There is no documentary evidence from Messrs Skrine & Co showing acceptance of the UMBC cheque 711034. On the contrary Messrs Skrine & Co vide their letter dated 19 October 1988 returned the said original cheque 711034, indicating that it was never banked in. This in itself would follow that there was no acceptance of the sum of RM17,500 representing a portion of the ten percent deposit. It is also noted that there is no evidence adduced on behalf of the intervener plaintiffs through their witnesses S11, S12 and S13 that they had paid the differential sum of RM35. It is settled law that an option is a unilateral contract which does not become binding on the grantor of the option until the exact terms of the option are complied with.

**[12]** Based on the reasons above mentioned, it is abundantly clear that the ten percent deposit was not paid by 18 October 1988 and that there was no acceptance of the ten percent deposit by the first to the sixth defendants. Thus it follows that there is no binding or concluded contract between the intervener plaintiffs and the third party and consequently there is no binding or concluded contract between the intervener plaintiffs and the first to the sixth defendants as vendors. For these reasons alone the first to the sixth defendants' appeal against the order of the learned trial judge granting specific performance of the sale of the said land to the intervener plaintiffs would succeed and I would allow their appeal.

**[13]** I shall now deal with the issue of whether there was a concluded contract when payments were made by the first and the second plaintiffs in allegedly exercising the option given by the third party acting for the first to the sixth defendants. It is noted at the outset that the first and second plaintiffs' claim as pleaded by them in the statement of claim was based on an oral agreement of sale made with the third party. In this case I find the learned trial judge had erred when he failed to consider the pleaded case at all. He had instead found that there was a concluded agreement in writing namely the Option dated 10 October 1988. There was no amendment made to the first and second plaintiffs' statement of claim on this point. I take the view in this case that failure to consider the pleaded case, but deciding on an unpleaded case in a civil litigation is a clear misdirection. The appellate court in the circumstances of this case therefore has a duty to intervene where the trial court has so fundamentally misdirected itself (see the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395).

**[14]** Even assuming the learned trial judge was right in concluding that there was an option which could have constituted an agreement, he ought to have dealt with adequately the pertinent points raised by the first to the sixth defendants as follows:

(i) that the ten percent purchase price under the option had to be paid within 14 days and the option would have lapsed if the payment of ten percent was not made by 25 October 1988.

(ii) that the option was conditional upon the lapse of the existing offer by the first and second intervener plaintiffs.

**[15]** Based on the evidence adduced in court and from the documents produced it has been shown by the first to the sixth defendants that ten percent of the purchase

price as deposit was not paid within the required time frame. The first and second plaintiffs alleged that the ten percent deposit was paid on or before 25 October 1988. The sequence of events with regard to whether the said sum was actually paid or not can be seen as follows:

**[16]** On 9 October 1988 the first and second plaintiffs handed over to the third party as the agent in the third party's office in Brickfields, Kuala Lumpur one MBB (Cameron Highlands) Demand Draft No 131725 for RM16,800 and one post dated MBB cheque No 667064 dated 18 October 1988 for RM18,200. Therefore on 9 October 1988, the option was not exercised because only RM16,800 which was good for payment was given.

**[17]** On 15 October 1988 one MBB cheque No 131739 for RM18,200 (in replacement of the post dated MBB cheque No 667064) was banked into the third party's account plus two postal orders amounting to RM1,400 and also banked into the third party's account by the second plaintiff. The date 15 October 1988 was a Saturday. Therefore the said MBB cheque No 131739 for RM18,200 could only be released for payment after three working days (of a local cheque) or about seven working days (if outstation cheque) [see *Law on Banker and Customer* (4th Ed) by Poh Chu Chai]. It would follow that assuming the RM16,800 MBB Demand Draft No 131725 is good, together with the two postal orders amounting to RM1,400 is good, the first and second plaintiffs would only have paid a sum of RM18,200 by the 15 October 1988 which is still less than the ten percent required. At that juncture the said ten percent deposit was not fully paid.

**[18]** On 17 October 1988 Messrs Mura Raju & Co acting for the first and second plaintiffs wrote to Messrs Skrine & Co acting for the vendors stating that ten percent payment for the option was exercised by the first and second plaintiffs paying RM36,400. However, this fact cannot be correct. On 17 October 1988 the third party's solicitors, Messrs Fernandez, D'Silva & Partners returned the first two cheques, ie, MBB Demand Draft No 131725 for RM16,800 and the post dated MBB cheque No 667064 in its original form to the first and second plaintiffs. It is noted that the RM16,800 demand draft was not banked into the third party's account. So, the issue here is whether by the holding of a cheque and/or demand draft, this would constitute acceptance by the holder in the light of the same holder returning the cheque/demand draft a few days later (ie, rejecting it). The answer in my view clearly is that there was no acceptance in any event by the date 25 October 1988.

**[19]** Further on 29 October 1988 the third party's solicitors return RM19,600 vide the third party's Oriental Bank ('TOB') cheque dated 17 October 1988 to the first and second plaintiffs. This returning of deposit is further confirmed by the plaintiff's witness, PW1 in his evidence when he stated as follows:

A Refer muka surat 32 PBD:

Ya, surat ini ialah daripada peguam defendan ketujuh yang memulangkan wang tersebut kepada saya. Selepas wang itu dikembalikan kepada saya oleh peguam defendan kedua, saya tidak hantar balik wang tersebut kepada defendan ketujuh atau defendan pertama hingga keenam pada bila-bila masa.

B

Refer muka surat 20-21 PBD:

Ini adalah bayaran kepada defendan ketujuh pada 15 October 1988. Wang ini juga dikembalikan kepada saya.

C

Refer muka surat 49 PBD:

Ya, ini surat daripada peguam defendan ketujuh yang mengembalikan wang tersebut kepada saya.

D

[See pp 153 and 154 of Appeal Record (Volume I)].

**[20]** It is clear from the above that the ten percent deposit under the option was not paid. There was no binding or concluded contract between the first and second E plaintiffs and the third party and it consequently follows that there was no binding or concluded contract between the first and second plaintiffs and the first to the sixth defendants.

**[21]** It is also my view that the option granted to the first and second plaintiffs was F conditional upon the lapse of the existing offer by the first and second intervener plaintiffs. This was the pleaded case by the third party (see p 68 of Appeal Record (Volume I)). This was also pleaded in the alternative by the first to the sixth defendants in their defence (see p 42 of Appeal Record (Volume I)). I find the learned trial judge failed to address this aspect of the case. In fact on this point evidence was led by the third party through its witness, Rajandran a/l Kovalpichay (DW2) G (see pp 333–335 of Appeal Record (Volume II)). It is my judgment had the learned trial judge adequately approached this point as an issue before him, he would have found that the facts do not support his finding that there was a concluded contract. This is because at that point of time when the offer under the said option was said to be made by the plaintiffs, the offer by the first and second intervener plaintiffs H under the same said option was still subsisting. It is my considered view when the condition in the said option is not satisfied there can be no concluded contract (see the case of *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy* [1996] 3 MLJ 385).

I **[22]** With regard to the position of the third party in relation to his dealings with the other parties involved in this case, I am of the considered view that we need not have to consider the actual authority vested in the third party as an estate agent for the first to the sixth defendants. We are only concerned here with his apparent and/or ostensible authority in his dealings with the intervener plaintiffs and the plaintiffs in this case. In short what the third party as estate agent contrived to do was well within

that so-called apparent or ostensible authority. When he said and set the purchase price at RM28,000 per acre the intervener plaintiffs and the plaintiffs were fully entitled to accept that statement as that of the landowners [the first to the sixth defendants] and act thereon accordingly. Even if no consent had been given by the first to the sixth defendants to the third party then (which intending purchasers will not normally know about) I find such an offer was made by the third party in the ordinary and usual course of his business as estate agent and as representing the landowners. Therefore it cannot be gain said that he did not have the apparent and/or ostensible authority to do so to bind his principal to the slightly lower purchase price of RM28,000 per acre for the land (see s 190 Illustration (a) of Contract Act 1950). For these reasons, it is my judgment that the first and sixth defendants have no merit in their appeal against the order of the learned trial judge in dismissing their claim for indemnity against the third party.

CONCLUSION

**[23]** For the reasons already given I would allow the first to the sixth defendants' appeal with costs here and below against the order of the high court granting specific performance of the sale of the said land to the intervener plaintiffs and the order of the high court in awarding damages to the first and second plaintiffs to be assessed by the senior assistant registrar. The said two orders made by the learned trial judge are hereby set aside. The cross appeal by the first and second plaintiffs consequently would be dismissed with costs. I would also allow with costs the appeal of the first to the sixth defendants in respect of the order of the high court in dismissing the first to the sixth defendants' counterclaim against the first and second plaintiffs. In allowing the first to the sixth defendants' counterclaim against the first and second plaintiffs I hereby make the following orders:

(a) an order that the caveat to the said land CT 4217, Lots Nos 52 and 62, Mukim Ringlet, Daerah Cameron Highlands, Pahang Darul Makmur lodged by the first and second plaintiffs be removed pursuant to s 327 of the National Land Code 1965;

(b) damages for wrongfully lodging the said caveat and consequential loss if any to be assessed before the Senior Assistant Registrar of the High Court and interest thereon;

**[24]** The first to the sixth defendants' appeal against the order of the High Court in dismissing their claim against the third party is hereby dismissed. Since the first to the sixth defendants' claim against the third party is for indemnity by the third party in respect of the claims made by the intervener plaintiffs and the first and second plaintiffs against the first to the sixth defendants and the claim is made in the alternative, there would be no order as to costs against the first to the sixth defendants.

**[25]** The deposit paid by the first to the sixth defendants for this appeal is to be refunded to the first to the sixth defendants. The deposit paid by the first and the second plaintiffs for the cross appeal is to be paid to the first to the sixth defendants on account of taxed costs.

A **[26]** My learned brothers, Mokhtar Sidin and Mohd Ghazali JJCA had seen this judgment in the draft and have expressed their agreement.

*Appeal dismissed.*

B Reported by Loo Lai Mee

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